SUPREME COURT OF THE UNITED STATES.

No. 159.

WILLIAM ALDRICH, MARTIN B. MEDBURY, H. H. SMITH, JOHN W. MEDBURY, AND JAMES F. ALDRICH, PLAINTIFFS IN ERROR,

vs.

THE ÆTNA INSURANCE COMPANY.

IN ERROR TO THE SUPREME COURT OF BUFFALO FOR THE DISTRICT OF NEW YORK.

INDEX.

	Original.	Print.
Citation	1	1
Writ of error	4	2
Assignment of errors	7	3
Bond	11	4
Proceedings in Court of Appeals of New York	14	5
Judgment of Court of Appeals of New York	15	5
Proceedings in Superior Court of Buffalo	16	6
Agreement to submit	16	6
Agreed statement of facts	18	7
Judgment of Superior Court of Buffalo	31	15
Certificate of clerk of Superior Court of Buffalo	31	14
Final judgment of Superior Court of Buffalo	32	15
Clerk's certificate	33	15

1 Supreme Court of the United States.

WILLIAM ALDRICH, MARTIN B. MEDBERRY, H. H. Smith, John W. Medberry, and James F. Aldrich, plaintiffs,
vs.
THE ÆTNA INSURANCE COMPANY, defendant. } In error.

UNITED STATES OF AMERICA, *ss:*

To the Ætna Insurance Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday of December next, pursuant to a writ of error filed in the office of the clerk of the Superior Court of Buffalo, in the State of New York, wherein William Aldrich, Martin B. Medberry, H. H. Smith, John W. Medberry, and James F. Aldrich are plaintiffs, and you are defendant in error, to show cause, if any there be, why the judgement in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

SAMUEL F. MILLER, *Associate.*

Witness the honorable justice of the said Supreme Court of
2 the United States this 4th day of May, in the year of our Lord one thousand eight hundred and sixty-seven.

SAM. F. MILLER,
Asso. Ju. S. C. U. S.

UNITED STATES OF AMERICA.
Northern District of New York, City of Buffalo, ss:

Edwin C. Robbins, being duly sworn, saith that he served on the Ætna Insurance Company, defendant in error, on the 18th day of November, 1867, a true copy of the above citation, to be filed in this cause with the Clerk of the Superior Court of Buffalo, in the State of New York, by delivering a true copy of the said citation to Eben P. Dorr, the agent of the said defendant personally, and also by delivering another true copy of said citation to John Ganson, esq., the attorney and counsel of said defendant, personally, and that such services were made in the city of Buffalo, in the State of New York.

EDWIN C. ROBBINS.

Sworn to this 18th day of November, 1867, before me.

ASHER P. NICHOLS,
U. S. Comm'r.

Endorsed: Supreme Court of the United States. William Aldrich *et al.*, plaintiff, *vs.* Ætna Insurance Co., defendant. Citation. Filed Nov. 8, 1867.

3 United States Circuit Court, Northern District of New York.

THE ÆTNA INSURANCE CO.
ads.
WILLIAM ALDRICH, MARTIN B. MEDBURY, H. H. Smith, and James F. Aldrich. } In error.

NOVEMBER 16, 1867.

Robt. Rae, att'y for pl'ffs.

On filing præcipe in this cause, and on motion of Robert Rae, esq., attorney for plaintiffs in error, it is ordered that a writ of error do issue out of and under the seal of this court, removing cause from the Superior Court of Buffalo into the Supreme Court of the United States.

Witness my hand and seal the of said Circuit Court, at my office, in the city of Utica, in said District, this 16th day of November, A. D. 1867. A copy as entered.

[SEAL.] A. A. BOYCE, *Clerk.*

Fees $2 00. Fees $2, chd N. & R.

4 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the justices of the Superior Court of Buffalo, and to the Superior Court of Buffalo, greeting:

Because in the record and proceedings, as also in the rendition of a judgement in a plea or action, which lately was in the Court of Appeals of the State of New York, the record and proceedings in which plea or action have been remitted and sent to the said Superior Court of Buffalo by the said Court of Appeals, which record and proceedings now remain with and on the file and in the office of the said Superior Court of Buffalo, and which plea and action was in favor of the Ætna Insurance Company, plaintiffs, and against William Aldrich, Martin B Medbury, H. H. Smith, John W. Medbury, and James F. Aldrich, defendants, a manifest error and manifest errors have happened to the great damage of the said William Aldrich, Martin B. Medbury, H. H. Smith, John W. Medbury, and James F. Aldrich, as by their complaint appears;

5 and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgement be therein given, that then, under your seal, distinctly and openly, you send the record of said proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December, one thousand eight hundred and sixty-seven, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error and those errors what of right, and according to the law and custom of the United States, should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this 16th day of November, in the year of our Lord one thousand eight hundred and sixty-
6 seven, and of the independence of the United States the ninety-second

[SEAL.] AUGUSTUS A. BOYCE,
Clerk of the Circuit Court of the United States,
for the Northern District of New York.

ROBT. RAE,
Attorney for Plff's in Error, Chicago, Illinois.

Endorsed: Supreme Court of the United States. The Ætna Insurance Co. *ads.* William Aldrich *et als.* Writ of error. I hereby allow the within writ. Henry E. Davies, chief judge of the Court of Appeals of the State of New York. Filed Nov. 18th, 1867.

Supreme Court of the United States. Of December term,
7 in the year of our Lord one thousand eight hundred and sixty-seven.

WILLIAM ALDRICH *et al.*
vs.
THE ÆTNA INSURANCE CO. } In error.

Afterwards, to wit, on the first Monday of December, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, come William Aldrich, Martin B. Medbury, H. H. Smith, John W. Medbury and James F. Aldrich, by Robert Rae, their attorney, and say that in the record and proceedings aforesaid their is manifest error, in this, to wit:

First. That the Court of Appeals of the State of New York erred in adjudging that the statute of the State of Illinois, entitled chattel mortgages, approved March 3d, 1845, applied to, and was
8 operative upon, the schooner "Stella," in the port of Buffalo, the same being a vessel of over twenty-tons burthen, and at the time when the mortgages was made, executed, delivered, and recorded with the collector of customs at the port of Chicago, and the cause of action stated and set forth in the plaintiff's narr. arose, and when said suit was commenced at Buffalo, enrolled and licensed for the coasting trade, and employed in the business of commerce and navigation between ports and places in different States and Territories of the United States, upon the lakes and navigable waters connecting the same.

Second. The Court of Appeals erred in applying the provisions of sections one, (1,) two, (2,) and three, (3,) of said statute, to such a vessel, said sections being, when so applied, unconstitutional and void, and the same being in conflict with that clause of the Constitution of the United States which confers upon Congress the power to
9 regulate commerce with foreign nations and among the several States, and the acts of Congress passed in pursuance thereof.

Third. The Court of Appeals erred in refusing to extend to the defendants the benefits of the act of Congress passed July 29, 1850, entitled "Recording conveyancers of vessels, &c," said defendants having complied with the requirements of said act, at the time of making, executing, and delivering said mortgage to them, and before the commencement of this suit.

Fourth. The Court of Appeals erred in refusing to apply the act of Congress relating to the recording of vessels, passed July, 1850, so as to protect the defendants against the claims of third parties having choses in action against the mortgagors of said schooner, said defendant having complied with the requirements of said
10 act of Congress in said cases made and provided at the time of making, executing, and delivering said mortgage and before the commencement of this suit.

And the said William Aldrich, Martin B. Medbury, H. H. Smith, John W. Medbury, and James F. Aldrich pray that the judgement aforesaid may be reversed, annulled, and altogether held for nothing, and that they may be restored to all things which they have lost by occasion of the said judgement, &c.

ROBERT RAE,
Of Counsel for Aldrich et al., Appellants.

11 Supreme Court of the United States.

WILLIAM ALDRICH, MARTIN B. MEDBURY, H. H. Smith, John W. Medbury, and James F. Aldrich,	In error.
vs.	
THE ÆTNA INSURANCE COMPANY.	

Know all men by these presents that we, William Aldrich, Martin B. Medbury, H. H. Smith, John W. Medbury, and James F. Aldrich, principals, and Henry Mann and Herman Mann, our sureties, our heirs, executors, administrators, and assigns, are held and firmly bound unto the above-named Ætna Insurance Company in the sum of five hundred dollars, to be paid to the said Ætna Insurance Company, to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals, and dated the 28th day of February, in the year of our Lord one thousand eight hundred and sixty-seven.

Whereas the above-named William Aldrich, Martin B.
12 Medbury, H. H Smith, John W. Medbury, and James F. Aldrich have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the Court of Appeals of the State of New York:

Now, therefore, the condition of this obligation is such, that if the above-named William Aldrich, Martin B. Medbury, H. H. Smith, John W. Medbury, and James F. Aldrich shall prosecute their said writ of error to effect, and answer all costs; if he shall fail to make

good his plea, then this obligation to be void, otherwise the same shall be and remain in full force and virtue.

[L. S.] M. B. MEDBURY.
[L. S.] HERMAN MANN.
[L. S.] HENRY MANN.

Sealed and delivered in presence of—
J. C. H. VON SCHLEY.
HENRY MANN, Jr.

[United States internal revenue stamp, 50 cts., cancelled.]

I, Andrew G. Miller, judge of the District Court of the United States for the district of Wisconsin, do hereby certify that
13 the within and above-named obligors are known to me to be good and responsible for the within-named amounts.

Dated Milwaukee, Wis., February 28th, 1867.

A. G. MILLER.

Endorsed: Filed Nov. 18, 1867.

14 STATE OF NEW YORK, *ss:*

Pleas in the Court of Appeals, held at the Capitol, in the city of Albany, on the 31st day of December, in the year of our Lord one thousand eight hundred and sixty-two, before the judges of said court. Witness: Henry Denio, esquire, chief judge.

{ COURT OF APPEALS SEAL, NEW YORK. } CHARLES HUGHES, *Clerk.*

Witness:

THE ÆTNA INSURANCE COMPANY, resp't, *ag't* WILLIAM ALDRICH, MARTIN B. MEDBURY, H. H. Smith, John W. Medbury, and James F. Aldrich, app'l'ts.

Be it remembered, that on the 1st day of March, in the year of our Lord one thousand eight hundred and fifty-nine, William Aldrich and others, the appellants in this action, came here into the Court of Appeals, by Austin and Austin, their attorney and counsel, and filed in the said court their notice of appeal and return thereto from a judgment of the Superior Court of the city of Buffalo

And the Ætna Insurance Company, the respondent in said action, afterwards appeared in said Court of Appeals, by John Ganson, their attorney and counsel, which said notice of appeal and the return thereto, filed as aforesaid, are hereunto annexed;
15 whereupon the said Court of Appeals, the said cause having been duly submitted on the written arguments of the counsel of the respective parties, and after due deliberation having been had thereon, did order and adjudge that the judgment of the Superior Court appealed from in this action be in all things affirmed.

And it was further ordered and adjudged that the respondent recover against the appellants costs of appeal in this court.

It was also ordered that the record and proceedings be remitted to the said Superior Court, then to be proceeded upon according to law.

Therefore it is considered that the said judgment be in all things affirmed, with costs, as aforesaid, and stand in full force, strength, and effect.

And hereupon, as well the notice of appeal and return thereto aforesaid, as the judgment of the Court of Appeals aforesaid, by them given in the premises, are, by the said Court of Appeals, remitted into the Superior Court aforesaid, before the justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said court before the justices thereof, &c.

COR'S TEN BROECK,
Dep. Clerk.

COURT OF APPEALS, CLERK'S OFFICE,
Albany, January 12th, 1863.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the Court of Appeals, with the papers originally filed therein attached.

COR'S TEN BROECK,
Dep. Clerk.

16 Superior Court of Buffalo.

THE ÆTNA INSURANCE COMPANY *ag'st* WILLIAM ALDRICH, MARTIN B. MEDBERY, H. H. Smith, John W. Medbery, and James F. Aldirch.

To JOHN GANSON, esq., plaintiff's attorney, and DYER TILLINGHAST, esq., clerk of the Superior Court of Buffalo:

Take notice, that the defendants hereby appeal to the Court of Appeals from the judgment of the general term of the Superior Court of Buffalo, entered in the above-entitled action in the office of the clerk of the Superior Court of Buffalo, on the tenth day of August, 1858, in favor of the plaintiff and against the defendants, for the sum of six hundred and fifty-seven dollars and sixty-nine cents, damages and costs.

Dated December 29, 1858.

AUSTIN AND AUSTIN,
Defendant's Att'ys, Buffalo, N. Y.

Filed December 29, 1858.

Superior Court of Buffalo.

THE ÆTNA INSURANCE COMPANY
against
WILLIAM ALDRICH, MARTIN B. MIDBERY, H. H. Smith, John W. Midbery, and James F. Aldrich.

A question of difference has arisen and exists between the parties aforesaid, which might be the subject of a civil action; and we, the said parties, who have subscribed hereto, have agreed, and
17 do hereby agree, upon the case hereunto annexed, which contains all the facts upon which the said controversy depends, and to present and submit the facts without action to the said Superior Court of Buffalo, under and in pursuanee of the 372d section of code of procedure.

Witness our hands this 25th day of May, one thousand eight hundred and fifty-seven.

ÆTNA INSURANCE COMPANY,
By BENJAMIN BAGNALL, *General Agent.*
WILLIAM ALDRICH.
MARTIN B. MEDBERY.
H. H. SMITH.
JOHN W. MEDBERY.
JAMES F. ALDRICH,
Per BENJ. H. AUSTIN, *Their Att'y.*

STATE OF NEW YORK, *Erie County, ss:*

Benjamin Bagnall and Benjamin H. Austin, being duly sworn, each for himself, say: That the controversy between the parties to the case hereto annexed, and to the foregoing submission, is real, and that the proceeding is in good faith to determine the rights of the parties thereto.

And the said Benjamin Bagnall, for himself, says: That he is the agent of the Ætna Insurance Company, the party named as plaintiff in the said proceeding, and as such is authorized to enter into this case and submission, and that he has subscribed the same as such agent, as aforesaid.

And the said Benjamin H. Austin, for himself, says: That the defendants named in said proceeding compose the firm of Aldrich, Smith & Company, and that he is authorized by the
18 said firm, and has power and authority, to enter into the said case and submission, and subscribed the same for them.

BENJ. H. AUSTIN.
BENJAMIN BAGNALL.

Subscribed and sworn to before me this 25th day of May, A. D. 1857, at the city of Buffalo.

EDWARD STEVENS,
Commissioner of Deeds for Buffalo.

Superior Court of Buffalo.

THE ÆTNA INSURANCE COMPANY
against
WILLIAM ALDRICH, MARTIN MEDBERY, and others.

Case submitted to the Superior Court of Buffalo under the 372d section of the code of procedure.

On the fourth day of February, one thousand eight hundred and fifty-six, the persons above-named as defendants, conveyed to one Benjamin F. Jacobs the whole of the schooner called the "Stella," and he on the same day executed at Chicago, in the State of Illinois, to the defendants, a mortgage on the schooner to secure the payment of six thousand dollars of the purchase money. Five thousand dollars of this purchase money still remains unpaid; fifteen hundred dollars is at this date due and unpaid, and five hundred dollars thereof was due and unpaid on the first day of October, 1856; which mortgage is in the words and figures following:

To all whom these presents shall come:

Know ye that I, Benjamin F. Jacobs, of Chicago, Illinois,
19 of the first part, in consideration of the sum of six thousand dollars, which I justly owe unto Aldrich, Smith & Co., of Two Rivers, Wisconsin, party of the second part, have, for the purpose of securing the payment of the said debt and interest thereof, granted, bargained, and sold, and by these presents do grant, bargain, and sell unto the said party of the second part, all and singular the goods, chattels, and personal property mentioned and described in the following schedule, to wit:

The whole of the schooner or vessel called the "Stella," together with the whole of her masts, spars, boat-rigging, tackle, apparel, and furniture, and everything appertaining or belonging thereto. The certificate of the enrollment of which said vessel is in the words and figures following, to wit:

(Enrollment.—No. 6 *(six).*

In conformity to an act of the Congress of the United States of America, entitled "An act for enrolling and licensing ships and vessels," &c., passed February 18, 1793, and an act to regulate the foreign and coasting trade of the northern and northeastern and northwestern frontiers of the United States, and for other purposes, passed March 2d, 1831, and the acts of 7th July, 1838, and 29th July, 1850, J. F. Aldrich, of Chicago, Illinois, having taken or subscribed the oath required by the said acts, and having sworn that he is one-sixth owner, together with Wm. Aldrich, of Two Rivers, Wis., one-sixth owner, and H. H. Smith, of the same place, two-sixth owner, and Martin Medbery and John Medbery, of Milwaukie, Wis., each owners of one-sixth, under the name and style of Aldrich, Smith & Co., citizens of the United States, sole owners of the schooner or

vessel called the Stella, of Chicago, whereof Frederick Harris is at present master; and as he hath sworn is a citizen of the United States, and that the said schooner or vessel was built at Two Rivers, Wis., in the year 1854, as appears by the certificate of James Harbridge, her master-builder, now on file in this office, and Fred C. Russel, special surveyor at the port of Chicago. The said schooner or vessel has one deck and two masts; and that her length is one hundred feet and six inches; her breadth, twenty-five feet and nine inches; her depth, seven feet and four inches; and that she measures 176 tons 71 ninety-fifths; that she is a schooner; has no gallery and no figure head; and the said J. F. Aldrich having agreed to the description and admeasurement above specified, and sufficient security having been given, in conformity with the terms of said acts, the said schooner has been enrolled at the port of Chicago.

Given under my hand and seal, at the port of Chicago, this thirteenth day of March, in the year one thousand eight hundred and fifty-five.

F. J. RUSSELL, *Dep. Coll.*

To have and to hold the same, and every part and parcel thereof, unto the said party of the second part, forever, provided always, and the condition of these presents is such, that if the said party of the first part shall pay to the said party of the second part, or to their agent, attorney, or assignee, the debt aforesaid, with the interest thereof from the date hereof, at the rate of ten per cent. per annum, in the manner following, to wit: Five hundred dollars on the first day of July, A. D. 1856; five hundred dollars on the first day of September, A. D. 1856; five hundred dollars on the first day of October, A. D. 1856; five hundred dollars on the first day of January, A. D. 1857; five hundred dollars on the first day of March, A. D. 1857; one thousand dollars on the first day of June, A. D. 1857; five hundred dollars on the first day of July, A. D. 1857; one thousand dollars on the first day of September, A. D. 1857; five hundred dollars on the first day of January, A. D. 1858; and five hundred dollars on the first day of March, A. D. 1858, according to the tenor of ten certain promissory notes, made by first party, payable to the order of said second party at the bank of Geo. Smith & Co., Chicago, said notes bearing even date herewith, with interest at ten per cent., payable semi-annually in advance, then these presents shall be void and of no effect, subject, however, to the provisions hereinafter contained. And the said party of the first part does hereby agree to pay the same accordingly, in the manner and at the times above mentioned. But if default be made in such payment, or if the said party of the second part shall at any time deem themselves in danger of losing the said debt, or any part thereof, by delaying the collection thereof until the expiration of the time above limited for the payment thereof, the said party of the second part are hereby authorized to take possession of the said goods, chattles, and personal property, at any time wherever found, either before or after the expiration of the time aforesaid, and to sell the same, or so

much thereof as may be necessary to satisfy the said debt, interest, and reasonable expenses, on giving thirty days' notice of such
22 sale in some newspaper published in Chicago, and to retain the same out of the proceeds of such sale; the overplus (if any) to belong and to be returned to the said party of the first part. Said first party also agrees to keep said vessel insured in some good and responsible insurance company, to an amount sufficient to cover the amount that may from time to time be due on said notes, and interest, and to assign the policy or policies to the said second party.

And it is understood and agreed that the stipulations aforesaid are to apply to and to bind the heirs, executors, and administrators of the respective parties.

In witness whereof, the said party of the first part has hereunto set his hand and seal the fourth day of February, in the year one thousand eight hundred and fifty-six.

[SEAL.] B. F. JACOBS.

In presence of—
F. J. RUSSELL.

That the said schooner was, at the time said mortgage was executed, in the port of Chicago, in the State of Illinois.

That on the day of the execution of the said mortgage, the same was duly recorded in the office of the collector of customs for the port and district of Chicago, in the State of Illinois, in book "A," of mortgages, at pages five hundred and sixteen and seventeen, kept for that purpose by the said collector, under and in compliance with the act of Congress entitled "An act to provide for recording the conveyances of vessels, and for other purposes," passed and approved on the twenty-ninth day of July, one thousand eight hundred and fifty. The schooner had been, and was then, enrolled in
23 that office, and so remains to this day.

The said Benjamin F. Jacobs then resided in the city of Chicago, in the State of Illinois, and took possession of the said schooner, which was then there, and run the same, and kept possession thereof as such owner till the attachment herein mentioned was issued and levied upon the said schooner. The mortgage so taken as aforesaid remains the property of the defendants, and was never acknowledged by the mortgagor, nor recorded elsewhere than is above stated, and the same was never, nor was any copy of it ever, filed anywhere else.

At the time of the execution of the mortgage aforesaid, there existed a statute, passed by the legislature of the State of Illinois, which is still in force, of which the following is a copy:

"SECTION 1. No mortgage on personal property shall be valid as against the rights and interests of any third person or persons, unless possession of such personal property shall be delivered to, and remain with, the mortgagee, or the said mortgage be acknowledged and recorded, as hereinafter directed.

"SEC. 2. Any mortgagor of personal property may acknowledge

such mortgage before any justice of the peace in the justice's district in which he may reside, and said justice shall certify the same in substance as follows: 'This mortgage was acknowledged before me by A. B., (the mortgagor's name,) this day of , 18 ,' and the said justice shall also keep on his docket a memorandum of the same in substance, as follows, viz: 'A. B. to C. D., mortgage of (here describe the property,) acknowledged this day of , 18 ;' inserting the name of the mortgagor in place of A. B., and the name of the mortgagee in place of C. D., and the justice may receive therefor a fee of twenty-five cents.

"SEC. 3. Any mortgage of personal property so certified shall be admitted to record by the recorder of the county in which the mortgagor shall reside at the time when the same is made, acknowledged, and recorded, and shall thereupon, if bona fide, be good and valid from the time it is so recorded for a space of time not exceeding two years, notwithstanding the property mortgaged or conveyed by deed of trust may be left in possession of the mortgagor, provided that such conveyance shall provide for the possession of the property so to remain with the mortgagor.

"SEC. 4. A copy of any such mortgage made, acknowledged, and recorded as aforesaid, certified by the proper recorder from the proper record, may be read in evidence in any court of this State, without any further proof of the execution of its original, if said original be lost or out of the power of the person wishing to use it.

"SEC. 5. For recording any such mortgage the recorder recording the same shall receive eight cents for every one hundred words, and for copies thereof the same compensation only.

"SEC. 6. Any person having conveyed any article of personal property to another by mortgage, who shall, during the existence of the lien or title created created by such mortgage, sell the said personal property to a third person for a valuable consideration, without informing him of the existence and effect of such mortgage, shall forfeit and pay to such purchaser twice the value of such property so sold, which forfeiture may be recovered in an action of debt in any court having jurisdiction thereof, or if the amount claimed does not exceed one hundred dollars before any justice of the peace.

"SEC. 7. The provisions of this chapter shall be deemed to extend to all such bills of sale, deeds of trust, and other conveyances of personal property as shall have the effect of a mortgage or lien upon such property.

"Approved, March 3, 1845."

That on the first day of March, one thousand eight hundred and fifty-six, the plaintiff herein named insured the interest of the said Benjamin F. Jacobs in the said schooner for the sum of five thousand dollars for one year, and took his note to secure the payment of the premium bearing date on that day, and in the year last aforesaid for four hundred and seventy-five dollars, which note matured on the

fourth day of June, one thousand eight hundred and fifty-six.

26 That afterwards, and on the twenty-second day of March, one thousand eight hundred and fifty-six, the plaintiff, by its agent, consented to the transfer of the said policy to the defendants named herein, by writing thereon a permission in the words following, namely:

"Permission given to the assured to assign to Aldrich, Smith & Co., subject nevertheless to all conditions herein contained.

"Chicago, March 22d, 1856.

"G. S. HUBBARD, *Agent.*
"By HUBBARD & HARD."

That on the fourteenth day of April, in the year one thousand eight hundred and fifty-six, the said Benjamin F. Jacobs assigned the policy aforesaid to the defendants aforesaid, by an instrument in writing, endorsed thereon in words following, namely:

"For a good and valuable consideration received, I hereby sell, assign, and set over to Aldrich, Smith & Co., all my right, title, and interest in and to the within policy of insurance, and in case of loss or damage of the said vessel do hereby authorize them to collect and receipt all moneys that may be due and payable thereon, in accordance with the conditions of one certain mortgage from me to the said Aldrich, Smith & Co., upon said vessel.

"In witness whereof I have hereunto set my hand and seal this 14th day of April, A. D. 1856,

[L. S.] "B. F. JACOBS.

"In presence of—
"J. W. LARNED."

27 That on the eleventh day of December, one thousand eight hundred and fifty-six, the said schooner was in the port of Buffalo, in the State of New York, and the plaintiff commenced an action in the Supreme Court of Buffalo against the said Benjamin F. Jacobs upon the premium note aforesaid, to recover the amount thereof, which then remained unpaid, and applied upon proper affidavits to a judge of the said court for an attachment against the said Benjamin F. Jacobs as a non-resident of the State of New York, who was then not a resident of that State and an attachment was duly issued to the sheriff of the county of Erie; and he on the day and in the year last aforesaid attached the said schooner then lying in the city of Buffalo aforesaid, and retains the same by virtue of such attachment.

The plaintiff is a body corporate and politic, created, existing, and doing business as such, under and by virtue of the laws of the State of Connecticut.

The said schooner was during all the time herein mentioned a vessel of the United States enrolled and licensed for the coasting trade, and was engaged in the business and commerce and navigation between ports and places in different States and Territories of the United States upon the northwestern lakes and the waters connecting the same.

A question of difference now exists between the plaintiff and defendants above-named upon the foregoing facts. The plaintiff claims that the mortgage of the defendants cannot be set up as against the attachment aforesaid, and that the mortgage is void as against
28 it, and that it is therefore entitled to a judgment, declaring the lien of the attachment to be paramount to that of the defendant's aforesaid mortgage.

The defendants claim that upon the foregoing facts the said mortgage is not void as against the plaintiffs, but is valid and a lien paramount to that acquired in the vessel by the plaintiff under and by virtue of the attachment aforesaid.

The plaintiff has released the said vessel from the lien and operation of the said attachment at the request of the defendants, and on their promise to pay the note aforesaid, and the interest from the day of its maturity and the costs of the attachment suit, in the event court decides in favor of the plaintiff on this case.

Each and all of the parties aforesaid submit themselves to the jurisdiction and judgment of the court in the premises, and agree upon the facts hereinbefore stated by their signatures to this case, which is made in pursuance of the 372d section of the code of procedure.

It is hereby stipulated that in case the court decides in favor of the plaintiff upon the claim aforesaid, then judgment is to be given in favor of the plaintiff against the defendants for the sum of four hundred and seventy-five dollars, and interest on that sum from the fifth day of June, one thousand eight hundred and fifty-six, and the costs of the attachment and action aforesaid and of this action; but if the court decides in favor of the defendants upon the claim aforesaid, then judgment is to be given by the court in favor of the de-
29 fendants against the plaintiff for the costs of this action.

Witness the signatures of the respective parties this 25th day of May, one thousand eight hundred and fifty-seven.

ÆTNA INSURANCE COMPANY.
BENJAMIN BAGNALL, *General Agent.*
WILLIAM ALDRICH.
MARTIN B. MEDBERY.
H. H. SMITH.
JOHN W. MEDBERY.
JAMES F. ALDRICH.
Per BENJ. H. AUSTIN, *Their Att'y.*

At a general term of the Superior Court of Buffalo, held at the court house, in the city of Buffalo, on the ninth day of August, in the year one thousand eight hundred and fifty-eight. Present, Justices Verplanck and Clinton.

THE ÆTNA INSURANCE COMPANY
against
WILLIAM ALDRICH, MARTIN B. MEDBERY, H. H. Smith, John W. Medbery, and James F. Aldrich.

This action having been brought to argument upon a case made up under and in pursuance of the 372d section of the code of procedure,

after hearing Mr. John Ganson, counsel for the plaintiff, and
30 Benjamin H. Austin, counsel for the defendants, and mature deliberation having been had thereon, it is hereby ordered that the plaintiff recover, by reason of the matters set forth in the said case, the sum of four hundred and seventy-five dollars, and interest on that sum from the fifth day of June, one thousand eight hundred and fifty-six, and the costs of this action, and that judgment be entered against the defendants accordingly.

At a general term of the Superior Court of Buffalo, held at the court-house, in the city of Buffalo, on the ninth day of August, in the year one thousand eight hundred and fifty-eight.

Present, Justices Verplanck and Clinton.

THE ÆTNA INSURANCE COMPANY
against
WILLIAM ALDRICH, MARTIN B. MEDBERY, H. H. Smith, John W. Medbery, and James F. Aldrich.

On filing with the clerk of this court the foregoing submission and case thereto annexed, and in pursuance of the direction in the order of the general term of this court made in this action, on motion of John Ganson, attorney of the plaintiff above-named, it is or-
31 dered and adjudged that the plaintiff in this action recover of the defendants therein the sum of four hundred and seventy-five dollars and the interest on that sum from the fifth day of June, one thousand eight hundred and fifty-six, being the sum of seventy-two dollars and fifty-three cents, and the costs of this action, which have been adjusted at the sum of one hundred and ten dollars and sixteen cents, which in the whole amount to the sum of six hundred and fifty-seven dollars and sixty-nine cents, and the plaintiff have execution therefor.

Judgment signed this 10th day of August, A. D. 1858.

D. TILLINGHAST, *Clerk.*

Filed August 10, 1858, at $3\frac{3}{4}$ p. m.

OFFICE OF THE CLERK OF THE SUPERIOR COURT OF BUFFALO,
Feb'y 28, 1859.

I, Dyer Tillinghast, clerk of said court, do certify that the foregoing are true copies of an original notice of appeal and judgment roll on file in this office, and of the whole thereof.

Witness my hand and the seal of said court the day and year last above-written.

[SEAL.] D. TILLINGHAST, *Clerk.*

32 At a special term of the Superior Court of Buffalo, held at the court-house, in the city of Buffalo, in the State of New York, on the twentieth day of January, 1863.

Present: the Hon. J. A. Verplanck, justice.

THE ÆTNA INSURANCE COMPANY, respondent,
against
WILLIAM ALDRICH, MARTIN B. MEDBURY, H. H. Smith, John W. Medbury, and James F. Aldrich, appellants.

On reading and filing in the office of the clerk of this court the remittitur in the above-entitled action from the Court of Appeals to this court, wherein and whereby it appears, among other things, that the said Court of Appeals, after having heard the said action upon the appeal taken therein to the said Court of Appeals, and duly considered the same, did order and adjudge that the judgment of the Superior Court of Buffalo so appealed from in said action be in all things affirmed, and that the respondent recover against the appellants the costs of appeal in the Court of Appeals, and that the record and proceedings be remitted to this court, there to be proceeded upon according to law.

Now, on motion of John Ganson, esq., the attorney for said respondent, it is hereby ordered and adjudged that the judgment of the Court of Appeals so made and remitted as aforesaid be, and the same hereby is, adopted as and made the judgment of this
33 court; and the respondent's costs in said action of the said appeal in said Court of Appeals having been duly adjusted and fixed at the sum of two hundred and twenty-six dollars and fifty-five cents, it is further ordered and adjudged that the said respondent do recover of the said appellants the sum last mentioned, and that the said respondent have execution against said appellants therefor.

Judgment signed this twentieth day of January, in the year one thousand eight hundred and sixty-three.

[SEAL.] S. U. BRUNCK, *Dep. Cl'k.*

Filed Jan'y 20, 1863, at 10 a. m.

Superior Court of Buffalo, Clerk's Office.

STATE OF NEW YORK, *Erie County, City of Buffalo, ss:*

I, Amos A. Blanchard, the clerk of the Superior Court of Buffalo, do hereby certify that the foregoing is the writ of error filed in this office on this 18th day of November, 1867, and the citation on such writ of error, together with the proof of the service of said citation, also filed in this office on said 18th day of November, 1867; and the certified copy of the order made on issuing such writ of error,
34 and entered in the office of the clerk of the Circuit Court of the United States for the northern district of New York, which certified copy was also filed in this office on said 18th day of November, 1867; and the assignment of errors upon said writ of error, also filed in this office on said 18th day of November, 1867; and a true

and correct copy of the bond executed on behalf of the plaintiffs in error mentioned in said citation, and which bond remains on file in this office, and was filed herein on said 18th day of November, 1867; and a true and correct copy and transcript of the judgment roll and record of the proceedings in this court, and the Court of Appeals of the State of New York, in the cause and action mentioned and referred to in said writ of error, and now remaining of record in this office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Superior Court of Buffalo, at the city of Buffalo, this 18th day of November, 1867.

[SEAL.] A. A. BLANCHARD, *Clerk.*

...ATES

...COURT

...D. 1898.

...M. ALDRICH, ET AL.,
PLAINTIFFS,

vs.

...ETNA INSURANCE CO.,
DEFENDANT.

...COURT OF APPEALS OF NEW YORK.

SUPREME COURT

OF THE UNITED STATES.

DECEMBER TERM, A. D. 1868.

WILLIAM ALDRICH,
MARTIN B. MEDBERRY,
H. H. SMITH,
JOHN W. MEDBERRY
AND
JAMES F. ALDRICH,
Plaintiffs,

vs.

THE AETNA INSURANCE CO.,
Defendant.

POINTS AND ARGUMENT OF ROBERT RAE,

Attorney for Plaintiffs in Error.

The question which arises here is, whether a mortgage executed to secure part of the purchase money of an enrolled and licensed vessel under the laws of the United States, and duly recorded according to the Act of Congress, is valid against the creditors of the owner or subsequent grantees.

The facts which occasion this enquiry are, in brief, as follows:

The plaintiffs in error, on the 4th day of February, 1856, conveyed to one B. F. Jacobs, the whole of the Schooner Stella, and he on the same day executed a mortgage on the schooner to secure part of the purchase money. The schooner was at the time of the mortgage and before, a regular enrolled and licensed vessel, and was at the time of the making of the mortgage and up to the time of the commencement of the suit so enrolled and licensed, and engaged in business and commerce between ports and places in different States and Territories of the United States, upon the north-western lakes and the waters connecting the same.

At the time when the mortgage was made the schooner was lying at the port of Chicago, where her owner resided. On the first of March, 1856, the schooner was insured by the defendant in error, at the request of Jacobs, and his promissory note was taken for the premium, and on the 22d of March inst. permission was given to the assured to assign to the plaintiffs in error the Policy of Insurance, and it was endorsed on the policy that the assignment was made to secure in case of loss of the schooner by any of the perils, insured the amount mentioned in the mortgage.

On the 11th of December, 1856, the schooner being at the port of Buffalo, for the purpose of trade and commerce, was attached at the suit of the defendant in error, as the property of Jacobs, a non-resident.

The plaintiff in the attachment claims that the mortgage of the plaintiffs in error cannot be set up against the attachment and the mortgage is void as against it, and that the lien of the attachment is paramount to that of the mortgage.

The Court of Appeals of New York gave a judgment for the defendant in error, and the case is now brought before this Court for review. The case as decided by the Court of Appeals is found reported in 12 Smith, p. 92.

The Court will at once perceive the importance and magnitude of the question, and to the extent it concerns merchants and owners of vessels. Perhaps nine-tenths of the mortgages, amounting in the aggregate to many millions of dollars, secured upon our merchant marine, depend upon their validity as against third parties upon similar records to this mortgage.

The first point assigned as error is, that the Court of Appeals of the State of New York erred in adjudging that the statute of the State of Illinois entitled chattel mortgages, applied to and was operative upon the schooner Stella in the port of Buffalo—she being a vessel engaged in the coasting trade, enrolled, etc.

POINT I.

The statute of the State of Illinois only intended to embrace within its provisions such personal property as was regarded within the jurisdiction of the State and subject to its control. A vessel engaged exclusively in the domestic commerce of the State of Illinois and owned there while so engaged, is within its control as to navigation laws, ownership, etc.

A vessel enrolled and engaged in commerce with foreign nations, or among the several States, is a vessel not of the State of Illinois, but "a vessel of the United States," and is subject exclusively to the laws of Congress.

a. A vessel is regarded as part of the territory to which she belongs.

An enrolled American vessel does not belong to the State of Illinois or New York, or wherever her owner resides; but to the territory of the United States.

b. Beyond a marine league, the lakes no more than the high seas, are within the body of any County.

A vessel always when engaged in commerce is not within the waters of any particular State, but in the waters of the United States when for this purpose she enters bays, rivers, etc., of a particular State; under such circumstances, she is a vessel of the United States, in the waters of the United States, and is subject exclusively, in high and important concerns, to the laws of the United States.

A vessel is part of the territory to which she belongs, while in port preserves over to a very considerable extent the laws of the country to which she belongs.

While a vessel engaged exclusively in the domestic commerce of a State rarely goes beyond the territorial jurisdiction of the State, a vessel engaged in commerce usually tarries but a very short time in such territory, and finds her principal home abroad and upon the deep.

As an additional reason why the Legislature of Illinois never intended to embrace such vessels within the statute, was because such vessels' employment is such as to take and keep them out of the jurisdiction of the State, and her statutes of frauds and liens would not follow personal property taken by its owner into another country.

Green *vs.* VanBuskirk, 5 Wal., 311, 312.
Skiff *vs.* Solace, 23 Vermont, 279.

The State of Illinois is unknown to foreign nations. The State sovereignty exists only with relation to each other and the general Government—a State, as such, has no foreign commerce.

The statute of frauds is simply a municipal law, and not one having its sanction by virtue of universal law, and personal prop-

erty lawfully within a territory where such law does not prevail, is not in its traffic subject to such laws.

Taylor *vs.* Bordman, 25 Vermont, 589.
Oliver *vs.* Toms, 14 Martin, 93.
Norris *vs.* Mumford, 4 " 20.
Lanfer *vs.* Sumner, 17 Mass., 110.

POINT II.

That the Court erred in not applying the statute of the United States entitled, an Act to provide for the recording of conveyances of vessels, etc.

A regular enrolled vessel of the United States, being a vessel of the United States, was subject only to the laws of the United States; and there being no statute of frauds existing by any act of Congress, Congress passed, in reference to this property, the Act of 1850, entitled "An Act to provide for the recording of the conveyances of vessels, and for other purposes."

The Act was passed by virtue of the 4th clause of the 8th Sec., Art. I, of the Constitution, which gives to it power to regulate commerce with the foreign nations, and among the several States and with the Indian tribes.

Does the Act fall within the power?

It is contended that this is not a regulation of commerce, but legislation upon the subjects of commerce and the contract made between individuals, as such, and not States or nations, and that Congress cannot legislate on the instruments of commerce; this is too narrow a view of the word commerce, and of the power to regulate it.

The prevailing motive which led to the adoption of the Constitution was to regulate commerce—to rescue it from the embarrassing and destructive consequences resulting from the legislation of so many different States, and to place it under the protection of an uniform law.

A citizen of the United States may not be a citizen of the State where he resides, yet the navigation laws require him to enroll his vessel in the district where he resides. But when she leaves the State, according to the rule of law as to personal property, it is controlled, when outside of the jurisdiction of any particular State, being a movable with no *situs*, by the law of the *domicil* of the owner, which might be in a different State from the one where he resides. The law of his domicil may prescribe a conflicting law with the law of the place where he resides, and his vessel is enrolled. *Mobilia sequuentur personam.*

A vessel may be owned by one or more, and some of these owners may reside in different States, all having conflicting legislationupon the manner of acquiring and holding this class of property, so that the vessel is not under the protection of an uniform law.

A vessel is necessarily a wanderer, and if the laws under which she sails were not uniform, but subject to the various legislation of the States through which she must pass—she might be subject to great inconvenience. The title to her might be good in one State and bad in another, and then good again in a third, just as the legislation of such States might provide, and so with her equipage. "The comity of nations must yield to the positive law of the land."

Savigny, pp. 178–181.
Westlake on International Law, Sec. 271.
2 Kent's Commentaries, 599.

But the word commerce has a more extended signification.

The word commerce is not limited to traffic to buying and selling or the interchange of commodities, either between States as such, or individuals. It comprehends navigation and navigation laws. Commerce, says Ch. J. Marshall, is undoubtedly traffic but it is something more, it is "intercourse." It embraces commercial intercourse.

The mind can scarcely conceive a system for regulating commerce between nations which should exclude all laws concerning navigation.

If commerce does not include navigation, the government of the Union has no ~~doubt~~ power over the subject, and can make no law prescribing what shall constitute American vessels or requiring that they shall be navigated by American seamen. Yet the power has been exercised from the commencement of the Government.

All America understands and has uniformly understood the word commerce to comprehend navigation.

The power to regulate navigation is as expressly granted as if that term had been added to the word "commerce."

To what navigation does this power extend? The constitution informs us—with foreign nations and among the several States, and with the Indian tribes.

Commerce among the several States cannot stop at the external boundary line of each State, but may be introduced into the interior, or through it.

It does not comprehend that commerce which is completely internal which is carried on between man and man, or in different parts of the same State, and which does not extend to or affect other States.

What then are the objects of commerce and navigation over which the Congress has power?

Mr. Justice Johnson says, "Commerce in its simplest signification means an exchange of goods. But with the advancement of civilization, the *vehicles*, the agents and their various operations, become the objects of commercial regulations, ship building, the carrying trade, are all embraced within the power to regulate commerce."

Upon what subjects has Congress legislated, under the power to regulate navigation?

They may be divided into two classes:

First. Those which affect simply the instruments of commerce.

Second. Those which relate to the persons and contracts connected with navigation.

Under the first head are the Registry Enrollment and License Laws.

The place where a vessel's name should be painted, and the manner of changing their names, as to the character of vessels in which goods may be imported.

The equipage of vessels with life preservers, boats, pumps, medicine chests, water and provisions, and inspection laws as to seaworthiness. Shipping inflammable articles without notice. Licenses for tavern on shipboard.

Under the second as to contracts and persons connected with navigation.

The laws providing what bills of sale should contain—their acknowledgment and the manner of recording them.

The contract of seamen and their nationality. The recording of mortgages and other hypothecations—which is the subject of this enquiry.

The limitation in cases of fire and embezzelment on ship board, under contracts of affreightment. When charterers are to be deemed owners. Punishment for willfully destroying ships. Sailing regulations as to lights, movements, etc.

It may be answered that all these contracts of seamen and charter parties and bills of lading, are of Admiralty jurisdiction, and therefore within the meaning of the words commerce, navigation. But they are as much subject to common law jurisdiction as Admiralty. Both alike having concurrent jurisdiction in personam, although proceedings *in rem* being unknown to the common law as a common law remedy, are alone peculiar to the Admiralty. If there is any force in the proposition that the contract of mortgage is not a marine contract and it is a regulation of such a contract, it is answered that the act deals no further with it than it is connected with the pledge—the *re*—and it only legislates upon the titles of the vessel as connected with this pledge or lien. Every part of the contract may stand. But those who deal with the enrolled and licensed vessel may acquire rights in such vessel, and the statute legislates alone upon this subject.

The instruments of commerce, when dedicated to commerce by being enrolled and actually engaged in inter-State trade, are objects of commercial regulation within the meaning of the Constitution.

What is the power?

It is the power to regulate, that is, prescribe the rule by which navigation is to be governed.

To regulate, not the commerce of the several States respectively, but the commerce of the United States.

The commerce of the States was to be a *unit*, and the system by which it was to exist and be governed, must necessarily be complete, entire and uniform. In the language of Mr. Webster, its character was to be described in the flag which waved over it—"*E Pluribus Unum.*"

This power, like all other vested in Congress, is complete in itself, and may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution.

The sovereignty of Congress, though limited to specified objects, is plenary as to those objects.

The power over navigation among the several States is vested in Congress as absolutely as it would be in a single Government having in its constitution the same restrictions in the exercise of the power as we find in the Constitution of the United States.

The power of Congress comprehends navigation within the limits of every State in the Union, so far as that navigation may be in any manner connected with "commerce with foreign nations or among the several States."

The full power to regulate a particular subject implies the whole power, and leaves no residuum; that a grant of the whole is incompatible with the existence of a right in another to any part of it.

Many of the above points are elementary, and are now familiar words and phrases in the decision of our Courts and the arguments at bar. They were established in the great case of Gibbon *vs.* Ogden, (9 Wheaton 1,) and have never been doubted but always quoted by this Court with approval.

Steamship Co. *vs.* Portwardens, 6 Wal. 32.
Steamship Co. *vs.* Joliffe, 2 Wal., 459.
Gilpen *vs.* Phil., 3 Wal., 804.

POINT III.

Application of the above principles.

The Court of Appeals of the State of New York, in delivering their opinion, admit that there can be no doubt that the United States Government has power to pass all laws for regulating the transfer of the title of enrolled vessels as part of its supervisory power over the nationality of such vessels; and while the Government may properly require the recording of a mortgage of a vessel, because it is the transfer of the title, yet it regards the act when declaring that no bill of sale or mortgage shall be valid against any person other than the grantor or mortgagor, his heirs and devises, and persons having actual notice thereof under such bill of sale, mortgage, etc., be recorded in the office of the collector of customs where such vessel is registered or enrolled, as furnishing rules of evidence, and that the Act is regulating rules of evidence in the State tribunals with regard to this kind of chattel. Now this opinion, it is contended, with due respect for the exalted tribunal which delivered it, is founded in a grave mistake.

The recording is not evidence of the validity of the bill of sale or mortgage as against third parties, without notice of it; but essential to its validity.

As to the class enumerated in the statute, no title passes whatever from the grantor to the grantee; the bill of sale shall not be valid as to them. It is the same as if the statute had said no sale of any enrolled vessel shall be valid except by a written in-

strument, or one acknowledged in a particular way, just as the laws relating to real estate, passed by the several States. The instrument, it is true, is evidence of the sale—but it is more. It is the contract of sale, and if it is invalid then no sale has been made. When the Court admitted the power to regulate the transfer, it admitted the power to prescribe the only way in which the transfer could legally be made. In such cases the record is not only the evidence of title but it is the title. The Act makes the validity of the sale of a vessel depend upon some compliance with a rule in the custom house, just as it makes the legality of a coasting voyage depend upon some other rule of the same office, to-wit: licenses, clearances, etc.

The Act of Congress makes a bill of sale or mortgage valid upon complying with her recording laws. It is said the State of Illinois requires something more, and the Court is of an opinion that the State of Illinois has concurrent power with the United States to make such a law. But we have seen that when Congress has the power to regulate a given thing that power is not concurrent but exclusive, and although the State may legislate upon the same object for different purposes within her power, yet in the exercise of this power by Congress, by virtue of the Constitution, there should arise any conflict, the Federal power must prevail, and furnishes the rule.

But it is contended that the Act of Congress is only additional to those of the statutes of the States. The State statutes simply require that the mortgage should be recorded at the place where the owner resides or the property is situated. Now there could be no additional legislation needed for the purpose of ascertaining the ownership and transfer of vessels, if such vessels were to be regarded as within the requirement of these statutes. Third persons would then have constructive if not actual notice thereof. But it is further contended that the statute was not passed for the purpose of protecting third persons, but for the protection of the revenue. How would the record furnish any additional protection to the revenue than the already

existing requirements of the registry and enrollment laws? Surely a recorded paper, unaccompanied by an oath as to the verity of its recitals, would have no greater searching effect than the affidavits already required by the enrollment laws.

The bill of sale was valid between the parties, and if they desired to defraud the revenue by non-recording their conveyance, it was valid as to them. It was valid also as to those having actual notice of it. So that if the revenue was to be in this way protected, the conveyance was good between the wrong doers and those having actual notice of it. As much injury to the revenue might be inflicted by allowing the grantor the power to convey to his grantee, and sanctioning such a sale, and giving the grantee the benefit of it as to hold it invalid as to third parties. A contract which would defraud the revenue by its concealment ought to be bad between all the parties to it. But the Act makes this good between the parties and those having actual notice of the facts—but taints its validity when opposed, not to the interest of the revenue or navigation laws; but when opposed to the interest of the parties, without actual notice. This is the one idea of the statute, and without it the statute is like Polyphemus with his eye out—perfectly blind.

The fact is, such vessels were never regarded as in their transfers of title subject to the legislation of the several States.

Again it is said that if the enactment of Congress is regarded as a statute of frauds, then as regards that class of property, the statute comes directly in conflict with the State legislation upon the same subject.

But Congress has exclusive power over the transfers of enrolled vessels, and may pass statute of frauds in reference to it, and in fact it was by reason of the fact that Congress possessed such exclusive jurisdiction, that it became necessary for Congress to pass the present law—State legislation being unable to reach it. In many States where the statute of frauds prevails, there

are no laws passed similar to the chattel mortgage law of the State of Illinois; and a mortgage of personal property, unaccompanied by delivery of possession to the mortgagee, if within the statute of frauds, would be evidence of fraud against third parties. In the States of Pennsylvania and New Jersey, and some of the other States, no such laws exist. In Louisiana it is confined to railroads and slaves, and in those States that have them they are comparatively of modern invention. It will hardly be contended that a mortgage made on a vessel in those States where such laws do not exist, and the mortgagee not in possession, although the mortgage is recorded according to the requirements of the Act of Congress, would be bad as against the statute of frauds. Yet such would be the result if the doctrine of the Court of Appeals should be adopted.

Whether a mortgage of goods, wares and merchandise is within the statute of frauds, is apparently to be considered a doubtful question. The Superior Court of Maine have expressed themselves not satisfied that the statute was to be so construed.

Gleason *vs.* Drew, 9 Greenl. (Me.,) 79.
Brown on the Statute of Frauds, § 294.

The law of Illinois in reference to chattel mortgages, as construed by her courts, produces no such conflict with the Act of Congress as the decision of the Court of Appeals would infer.

The mortgage is not invalid against third persons with knowledge of its existence, and in the case at bar there is some evidence tending to show that the defendant in error had such knowledge before the commencement of the attachment suit. The Insurance Company permitted in writing on the policy that the policy should be assigned to the plaintiffs in error, and it was endorsed on the policy that the assignment was made to secure this mortgage. (Fol. 26.)

Hathorn et al. *vs.* Lewis, 22 Ill., 395.

The case upon authority.

In Fontaine *vs.* Beers, (19 Ala. 722,) the whole question was reviewed, and it was held that the statute of that State, which was similar to the statute of Illinois, did not apply to a vessel engaged in foreign commerce. The same was held in the case of the

Cape Fear Steamboat Company *vs.* Conner, 3 Rich., 335.
Robinson *vs.* Rice, 3 Mich., 235:
Brig Martha Washington, 25 Law Reporter, 22.
Veazie *vs.* Somerby, 5 Allen, 280.
Sinnott *vs.* Davenport, 22 How. 22.
Potter *vs.* Irish, 10 Grey, 416.

ROBERT RAE,

Attorney for Appellant.

No 137

Clifford

Mr. Justice Clifford

SUPREME COURT OF THE UNITED STATES.

THE ÆTNA INSURANCE COMPANY, DEFENDANT IN ERROR,

ads.

WILLIAM ALDRICH, MARTIN B. MEDBURY, H. H. SMITH, JOHN W. MEDBURY, AND JAMES F. ALDRICH, PLAINTIFFS IN ERROR.

BRIEF ON THE PART OF THE DEFENDANT IN ERROR.

JOHN GANSON, *for Defendant in Error, Buffalo, N. Y.*

SUPREME COURT OF THE UNITED STATES.

THE ÆTNA INSURANCE COMPANY, Defendant in Error,

ads.

WILLIAM ALDRICH, MARTIN B. MEDBURY, H. H. SMITH, JOHN W. MEDBURY and JAMES F. ALDRICH, Plaintiffs in Error.

BRIEF ON THE PART OF THE DEFENDANT IN ERROR.

JOHN GANSON, *for Defendant in Error.*

This case comes upon a writ of error to the Superior Court of Buffalo, in the State of New York. The writ of error is sued out, under the twenty-fifth section of the Judiciary act of 1789, for the purpose of reviewing a final judgment of the Court of Appeals of the State of New York.

The judgment was not rendered in an action, or in a suit, but was entered on a voluntary submission, without action or suit containing a statement of facts, agreed upon by the parties, pursuant to the Code of Procedure of the State of New York.

That code provides that a controversy may be submitted to a court, for decision, *without* action. The 372d section of the code says: "Parties to a question of difference, which might be the "subject of a civil action, may, without action, agree upon a case "containing the facts upon which the controversy depends, and "present a submission of the same to any court which would have "jurisdiction if an action had been brought. But it must appear "by affidavit that the controversy is real, and the proceeding in "good faith to determine the rights of the parties. The court "shall thereupon hear and determine the case, at a General Term, "and render judgment thereon, as if an action were depending."

The 374th section provides "that the judgment may be enforced "in the same manner as if it had been rendered in an action, and "shall be subject to an appeal in like manner."

The case, agreed upon by the parties to the proceeding, must contain all of the facts upon which their controversy arises. The

facts stated in this case are, in brief, as follows: Benjamin H. Jacobs, on the first day of March, 1856, owned a vessel. The defendant in error insured the vessel, on the first day of March, 1856, in the sum of $5,000, and took Mr. Jacob's promissory note to secure the premium, being $475. This note matured on the fourth day of June, 1856. On the eleventh day of December, 1856, the vessel was in the port of Buffalo, and the plaintiff in error commenced an action in the Supreme Court of New York, at Buffalo, to collect the amount of the premium note, against the owner of the vessel, as a non-resident of the State, and sued out an attachment. The attachment was issued in that action to the Sheriff, who found the vessel, then lying in the port of Buffalo, in the possession of Mr. Jacobs, and he seized it.

The plaintiffs in error appeared and claimed that they were entitled to the vessel, in preference to the defendant in error. They made their claim on the following facts: They, on the fourth day of February, 1856, sold and conveyed the vessel to Mr. Jacobs, who gave them a chattel mortgage, on the vessel, to secure the payment of $6,000 of the purchase money. They recorded their mortgage in the office of the Collector of Customs at Chicago, where the vessel was enrolled. The purchase money was payable in instalments, at times specified in the vendee's promissory notes.

The sale of the vessel took place at Chicago, in the State of Illinois. The bill of sale and the mortgage were exeuted and delivered there. The vessel was in the port of Chicago, at the time of the conveyance, and the mortgagor resided there. The mortgagor remained in possession of the vessel, and employed her in the business of commerce and navigation, for his own benefit.

The mortgagee were authorized, by the express terms of the mortgage, to take possession of the vessel in case there was any default in the payment of the notes secured by the mortgage, or in case they deemed themselves at any time, in danger of losing their debt or any part of it.

A portion of the debt became due on the first day of October, 1856, being $500. (Page 8, fol. 18½.) The mortgagor made default in the payment of that $500, and the mortgagees still permitted him to remain in the possession of the vessel and to employ it for his own benefit, in the business of navigation. The mortgage was never acknowledged or recorded, pursuant to the statute of Illinois.

The statutes of Illinois, relative to chattel mortgages, declare that no mortgage on personal property shall be valid, as against the rights and interests of any third person, or persons, unless possession of such personal property shall be delivered to, and remain with the mortgagee, or the mortgage be acknowledged and recorded as is therein directed. (Pages 10 and 11 of the Record.)

The defendant in error claimed that the mortgage was void: 1st, because the mortgagor was permitted to remain in the possession of the vessel, and the mortgage was not acknowledged and recorded, as required by the statute of Illinois, and 2d, because

the mortgagor was permitted by the mortgagees to remain in possession of the vessel *after forfeiture*, and use it for his own benefit, and his so remaining was not *consistent with the terms of the mortgage.*

The defendant in error released the vessel from the lien and operation of the attachment, at the request of the plaintiffs in error, on their agreement to submit the facts to the decision of the Superior Court of Buffalo, and on their promise to pay the the premium note and the interest, and the costs of the attachment suit, in the event that court decided in favor of the defendant in error on the submission.

The Superior Court did so decide. The plaintiffs in error appealed from that decision to the Court of Appeals of the State of New York. That court affirmed the decision of the Superior Court of Buffalo, and remitted the matter to that court, where judgment was entered on the twentieth day of January, 1863. accordingly. The plaintiffs in error, on the sixteenth day of November, 1867, sued out a writ of error to the *Superior Court of Buffalo*, and the writ was endorsed as allowed by "Henry E. Davies, *Chief Judge of the Court of Appeals of the State of New York.*"

The citation purports to be signed by His Honor, "Samuel F. Miller." The bond given on the issuing of the citation, is approved by His Honor, "A. G. Miller."

POINTS.

FIRST.

This court has not jurisdiction to review the judgment in question, under the twenty-fifth section of the Judiciary Act of 1789.

1. Because it is not a judgment in a "*suit*," within the signification of that word, as used in the act of 1789.

2. Because it does not appear *on the face of the record* that there is drawn in question the *validity of a statute*, or law, of the United States, or of a statute of any State, on the ground such state statute is repugnant to the laws of the United States, or that the construction of any statute of the United States is drawn in question.

3. Because the writ of error was allowed by the Chief Judge *of the Court of Appeals of the State of New York*, when it is addressed "*to the Superior Court of Buffalo*," in which court the record was.

4. Because the security on which the citation was issued was approved by a Judge of a District Court, and not by the judge who signed the citation.

AS TO THE JURISDICTION OF THIS COURT.

1. The submission on the agreed case was not a "suit." The statute under which the submission was made, is entitled, "submitting a controversy without action." Such submission has been decided in New York not to be an action or suit.

By the Revised Statutes of that State, provision is made requiring the court in which a judgment has been rendered in "an action" of ejectment, to vacate the same, and grant a new trial, upon the application of the party against whom the judgment was rendered. A judgment was rendered on a submission, under the 372d section of the code. The court refused to vacate the judgment, because the proceeding was not "an action."

1 Duer, 701, Lang *vs.* Ropke.

In some of the States parties are, by special statute, authorized to submit their matters in difference to arbitrators, and to have a judgment entered on the award. Provision is frequently made in such statutes for the reviewing of the decision of the arbitrators. This is so in the State of New Yorx.

2 Rev. Stat. (New York), 541.

It can be claimed that the judgment entered on such a submission is a "suit" with as much propriety as it can be claimed that the proceeding in question is a suit.

The appellate jurisdiction conferred on this court by the twenty-fifth section, was given to enable parties who have been involuntarily compelled to submit their rights to the decision of a State Court, to take the judgment of the Federal court, where any Federal law was drawn in question. There is not any necessity to extend the jurisdiction to those cases where parties, as in this instance, have voluntarily submitted their rights to a State tribunal without suit.

In this case neither party was a resident of New York. The plaintiffs in error resided in Wisconsin, and the defendant in error is incorporated under the laws of Connecticut. Still, they have voluntarily come into the State of New York, and submitted the adjudication of their rights to the courts of that State.

Under the twelfth section of the Act of 1789, it has been held that, where the citizens of one State bring a suit in another State against citizens of that State, the suit cannot be removed into the United States Circuit Court. The plaintiffs having voluntarily

come into a State Court, in such a case the right of removal does not exist.

The cases which hold that a judgment of a Circuit Court, rendered on an agreed statement of facts, may be reviewed by this court upon a writ of error, have not any application to this case, for in those cases the facts were agreed upon in "suits" and on regular trials. Here there is not any "suit" or trial.

Second. There is nothing appearing *on the face of the record* which shows that the validity or construction of any law of the United States *necessarily* came in question in the decision of the State courts. This must appear to give this court jurisdiction. If the State court *might* have decided, as it did, without deciding any question relative to the Act of Congress, then this court has not jurisdiction of this case.

13 Peters, 157, Ocean Insurance Company *vs.* Polleys.
6 Wall., 124, Walker *vs.* Villavaso.
6 Wall., 142, Rector *vs.* Ashley.
6 Wall., 177, Railroad Company *vs.* Rock.

The State courts *may* have given their decision on the ground that the mortgage in question was void, as to an attaching creditor, because the mortgagees permitted the mortgagor to remain in possession of the vessel when his retaining possession was not consistent with the terms of the mortgage. They might, and for aught that appears, did adopt the rule well settled in the State of Illinois, where the mortgagor resided, and contract was made, and where the property was when the contract was made, and where it was to be performed, that all conveyances of goods and chattels, where the possession is permitted to remain with the vendor or mortgagor, are fraudulent *per se*, and *void as to creditors* and purchasers, *unless the retaining of possession be consistent with the terms* of the conveyance. If such possession be not *consistent with the terms of the conveyance*, it is a fraud *per se*, and cannot be rebutted by evidence of *bona fide* intention. It is, in other words, *conclusive* evidence of fraud, so far as creditors are concerned. It is what is sometimes termed "*fraud in law.*"

1 Scam., 296, Thornton *vs.* Davenport.

This has been so decided in Illinois, with reference to chattel mortgages, *where mortgages have been properly recorded*, but default has been made, entitling the mortgagee to immediate possession.

19 Ill., 594, Reed *vs.* Eames.
21 Ill., 73, Thompson *vs.* Yeek.
23 Ill., 382, Cross *vs.* Perkins.
41 Ill., 365, Reese *vs.* Mitchell.

In the case at bar, the mortgage was void under the decisions. There had been default in paying the debt before the attachment was made, and the mortgagor was permitted to remain in possession, although the mortgage, by its terms, only allowed him to remain there so long as he performed its conditions promptly and faithfully.

By the common law the mortgage was void. *It was void under the statute of Illinois.* If the court so held, although erroneously, it would not give this court jurisdiction to re-examine the decision.

6 Wall., 142, Rector *vs.* Ashley.
1 Black., 518, Hoyt *vs.* Sheldon.
1 Black., 350, Farney *vs.* Towle.

The decision furthermore would be in harmony with the decisions of this court. It must be borne in mind, when examining this branch of the case, that the mortgagor was permitted to remain in possession of the vessel *two months and a half* (from October 1, 1856, to December 11, 1856), using the vessel for his own benefit, after default, *contrary to the express terms of the mortgage*, before the attachment was sued out. This made the mortgage void, at common law and under the decisions of this court, as to creditors.

1 Gal., 419, Meeker *vs.* Wilson.
1 Cranch, 309, Hamilton *vs.* Russell.
5 Cranch, Cr. C., 467, Smith *vs.* Hunter.
5 Cranch, Cr. C., 656, Noyes *vs.* Brent.
6 Wall., 78, Lukins *vs.* Aird.
Olcott's R., 196, the Schooner Romp.

The question, therefore, which arose in the case, and the only question, was as to the validity or invalidity, as against an attaching creditor, of the mortgage in question. It was executed in Illinois, by a resident of that State, on personal property situated there at the time the mortgage was given, and was to be performed there. The courts of New York decided that the validity of the mortgage was to be determined by the law of the State where the contract was made and was to be performed.

3 Com., 266, Hyde *vs.* Goodnow.
35 N. Y. R., 657, Guillander *vs.* Howell.
7 Wall., 139, Green *vs.* Van Buskirk.

Third. The writ of error was *allowed* by the Chief Judge of the *Court of Appeals*, whereas the writ is addressed to the *Superior Court of Buffalo*, in which latter Court the final judgment was entered and the record filed.

The act authorizes the allowance to be made by the Chief

Justice, Judge or Chancellor of the Court rendering or passing the judgment.

Sec. 25, of the Act of 1789.

The Clerk of the Circuit Court had no authority to issue the writ, except in the "same manner as the Clerk of the Supreme "Court might issue it under the Act of 1789."

1 U. S. Stat. at Large, 278, Sec. 9.

The *writ* is *tested November* 16, 1867, which was not in term time. The citation was signed fourth day of *May*, 1867. The bond was approved by a *district* judge, *February* 28, 1867. Citation was not served until *eighteenth of November*, 1867. It is believed that the term of December, 1866, had not expired when the citation was signed. It had not expired when the bond was approved. Thirty days did not intervene between the service of citation and return day. For these various reasons the writ was ineffectual.

7 Wall., 541, Palmer *vs.* Downer.
Act of 1789, Sec. 25.
20 How., 204, Carroll *vs.* Dorsey.
21 How., 195, Insurance Company of the Valley of Virginia *vs.* Mordecai.

(*In this case Justice Taney says:* "*The act of Congress re-*"*quires it* (*the citation*) *to be issued by the Judge or Justice who* "*allows the writ of error, and it cannot be legally issued by any* "*other Judge or Court.*")

6 Wall., 246, Agricultural Company *vs.* Pierce County.

Fourth. If the final judgment which is to be reviewed here is that of the Court of Appeals of the State of New York, there is nothing on the face of the record showing when that Court rendered judgment. The case was taken to the Court of Appeals on the *first day of March*, 1859, and was submitted for decision on written arguments. The *remittitur is dated the thirty-first of December*, 1862, but it speaks of the judgment of that Court as having been given at some prior time. The plaintiffs in error should show affirmatively, by the record, that the writ of error was returned *within five years* from the rendition of the judgment.

As to the Merits.

First. If the Court concludes it has jurisdiction to re-examine the final judgment in this matter, then the defendant in error insists that the decision of the State Court is right. The opinion

of Judge Masten, of the Superior Court of Buffalo, presents the case very clearly, and states the ground on which that Court based its judgment, thus: "The *validity* and *effect* of a convey- "ance of personal property is to be determined by the law of the "place where it is made. By the laws of Illinois, where this "mortgage was executed, where the property, at the time, was, "and where the mortgagor was domiciled," (and where the contract was to be performed,) "this mortgage never had any valid- "ity, or effect, against the rights of third persons. The property "was not delivered to, and did not remain with, the mortgagees. "The *mortgage did not provide for the possession of the prop- "erty by the mortgagor*, and it was neither acknowledged nor "recorded, as required by the statute laws of Illinois, set forth in "the case. The effect of the statute upon the mortgage was to "render it valid as between the parties to it, but of no validity as "against the rights of third parties. The statute expressly de- "clares that it is not valid as against the rights and interests of "third persons.

"I am of the opinion that *the act of Congress has no bearing "upon the question before us.* The mortgage was recorded as "required by that act. The act of Congress requires convey- "ances, &c., of vessels, to be recorded, and declares that unless "recorded as required by the act, they shall be void as against "third persons. *The act does not declare* (nor was such its object) "*what is a legal bill of sale, or mortgage of a vessel. It merely, "for the protection of bona fide purchasers, &c., requires that "conveyances of vessels shall be recorded, in the manner specified "in the act, leaving other requisites to the validity of the convey- "ance, as between parties to it, and as against the rights and "interests of third persons, to be determined by the laws of the "jurisdiction where made. It is simply a registry or recording "act.* Under the views I have taken of the act of Congress, it is "not necessary to consider whether Congress can, except for the "purpose of regulating the registry and enrollment of vessels, "pass laws prescribing the manner, form and requisites of the "transfer of the title to ships and vessels."

As has been shown above, under the point relative to the jurisdiction of this Court, the mortgage in question, by the well established rule in the State of Illinois, by the decisions of this Court, and by the common law, was void so far as third persons are concerned. The vessel was left in the possession of the Mortgagor, to use for his own benefit, *which was not consistent with the terms of the mortgage.* He was permitted to remain even after forfeiture. The sheriff found him in possession, using the property as his own, when he seized it under his attachment. It was therefore void, as to the defendant in error, unless there is something in the terms, or effect, of the act of Congress taking this species of property out of the rule applicable to other kinds of personal property.

That act is silent, as to any change of possession of vessels. It does not profess to abrogate the well settled rule, that all con-

veyances of personal property, where possession is permitted to remain with the vendor, or mortgagor, *are fraudulent, per se, and void*, as to creditors and purchasers, *unless the retaining of possession be consistent with the terms of the conveyance.*

1 Scam., 296, 298, Thornton *vs.* Davenport.
19 Ill., 594, Reed *vs.* Eames.
5 Serg. & Rawle, 275, Clow *vs.* Woods.
29 Penn. R., 288, Born *vs.* Shaw.
1 Gall., 419, Meeker *vs.* Wilson.
1 Cranch, 309, Hamilton *vs.* Russell.
Olcott's Admiralty R., 196, The Romp.
6 Wall., 78, Lukins *vs.* Aird.

This is the rule, even where the conveyance is recorded.

1 Cranch, 309, Hamilton *vs.* Russell.
19 Ill., 594, Reed *vs.* Eames.

It was not intended by this act of Congress, that a mortgagor should remain in possession of a vessel, and employ it for his own benefit, even after forfeiture, and thus keep property beyond the reach of his creditors.

There is not anything in the record, showing that the defendant in error had actual knowledge of the existence of this mortgage. The points on the part of the plaintiffs in error state, "That "there is some evidence tending to show that the defendant in "error had such knowledge before the commencement of the at-"tachment suit." Reference is made, as proof of this, to the fact, that the agent endorsed, on the policy of insurance, a permission to assign it to the plaintiffs in error. But there is not any reference to any mortgage in the *permission* thus endorsed. There is in the *assignment*, but it does not appear that the defendant in error ever saw the assignment. Furthermore, this case is to be heard on the *agreed statement of facts*, and the case does not state that the defendant had any actual knowledge of the existence of the mortgage.

The point which the court is now requested to decide was not involved, or passed upon, in the case of *White's Bank of Buffalo vs. The Proceeds of the Schooner Emmett*, decided at the December term of this court in 1868 (being No. 85). In that case there was a contest between two mortgages, over the remnants, in the registry of the Court of Admiralty, arising from the sale of the Schooner Robert Emmett. Both of the mortgages had been duly recorded under the act of Congress. Both mortgages were valid by the laws of the States where they were respectively executed. In the case at bar, the mortgage in question was not valid by the statute of the State where it was executed. In the former case, there was not any question, as to a want of change of possession. In the case at bar, there is. In the former case,

there was not any question of fraud. In the case at bar, there is. The sole question in the former case was, whether it was necessary, as between two mortgages, to comply with the recording acts of the States, as well as with that of Congress. In the case at bar, the important question is, whether the recording act of Congress has abrogated the former rules of this court, and of the common law: 1st, That the conveyance of a vessel, where the possession is permitted to remain with the vendor, or mortgagor, is fraudulent, *per se*, and *void as to creditors, unless the retaining possession of the vessel be consistent with the terms of the conveyance.* 2d, That the validity of a contract relating to personal property depends on the law of the place where the contract is made, and is to be performed, and where the property is situated when the contract is made, and where the owner is domiciled.

Second. The act of Congress is not a recording act, in the sense of that term, as used with reference to fraudulent conveyances. If it is to be regarded as an act to regulate the transfer of property, as between individuals, then it is insisted that the act is unconstitutional.

In the opinion delivered in the case of *White's Bank vs. the Proceeds of the Schooner Robert Emmett*, above cited, it is said, that "Some question is made as the power of Congress over the "*title* and *property* of vessels of the United States, to such an "extent as to enable it to pass a recording act."

From this remark it would seem, that it was not presented in that case as a serious question. The defendant in error, in this case, does not deny that Congress has the power to pass a recording act for certain purposes, but does insist that it has not the constitutional right to pass any law on this subject, which deprives the sovereign States of authority to legislate as to fraudulent bills of sale and mortgages on vessels. The serious attention and consideration of the court is, therefore, invited to this question, and to the views expressed in the following extract from a judicial opinion pronounced by His Honor George W. Clinton, on that subject.

We must now consider the act of Congress "to provide for recording the conveyances of vessels, and for other purposes," approved July 29, 1850. It is, undoubtedly, in some sense, a registration act, but is it such for all purposes, or only for the convenience and protection of the government, and, incidentally, for the information and convenience of the public? If it be strictly a registration act, it excludes all state legislation if it were in the power of Congress to enact it, and the question of power depends upon whether the act is a regulation of commerce. To solve these questions we may profitably inquire into the condition of the law prior to the act.

In Gibbons *vs.* Ogden, (9 Wheat., 1,) the Supreme Court of the United States held, that the power to regulate commerce with foreign nations and between the States, included the power to regulate navigation, and extending to licensing a vessel to pro-

ceed from port to port in the same state. In the case of the Steamboat Company *vs.* Livingston, (3 Com., 747,) the court for the correction of errors declared that the coasting trade included commercial intercourse carried on between different collection districts in the same state, and between different places in the same district.

This power necessarily extends to the defining of the instruments by which this commerce is to be conducted, and the manner in which it is to be conducted by them. In other words, it is for Congress to declare what ships shall be deemed vessels of the United States, and to exclude all others, and to prescribe the duties of such ships while engaged in such commerce, and, incidentally, to denounce penalties and forfeitures.

The principal acts of Congress touching navigation are 1, "An act concerning the registering and recording of ships and vessels," approved Dec. 31, 1792: 2, "An act for enrolling and licensing ships or vessels to be employed in the coasting trade and Fisheries, and for regulating the same," approved Feb. 20, 1793: and 3, "An act to regulate the foreign and coasting trade on the northern, north-eastern and north-western frontiers of the United States, and for other purposes," approved March 2, 1831.

The act of 1792, is the only one which defines vessels of the United States. It declares by § 1, that ships and vessels which shall have been registered by virtue of a previous act, and those which shall be registered pursuant to itself, *and no others* "shall be denominated and deemed ships or vessels of the United States, entitled to the benefits and privileges appertaining to such ships or vessels," but with a proviso "that they shall not continue to enjoy the same longer than they shall continue to be wholly owned and to be commanded by a citizen or citizens of the said States." Section two provides that ships or vessels built within the United States, whether before or after July 4, 1776, and belonging wholly to a citizen or citizens thereof; and ships or vessels not built within the United States, but which on the 16th of May, 1787, and thereforth, continuously belonged to a citizen or citizens of the United States; and ships or vessels captured by such citizens and lawfully condemned a prize, or adjudged forfeited for a breach of the laws of the United States, and wholly owned by a citizen or citizens of the United States, *and no other*, *may be*, (not must be,) registered as hereinafter directed. Section three requires that every ship or vessel thereafter to be registered, (except as thereinafter provided,) shall be registered by the collector of the district, in which shall be comprehended the port to which she shall belong at the time, which port shall be deemed to be that at, or nearest to which the sole owner, or if there be more than one, the husband, or acting and managing owner, usually resides, and that the name of the ship, and of her port shall be painted on her stern, in white, on a black ground. To procure the registry, the owner, or an owner, must make an affidavit before the collector, stating, among other things, the names of all the owners, and that they are all citizens of the

United States, (§ 4,) and (§ 5,) every other owner residing within the United States, must within ninety days after the certificate of registry is granted, make and transmit to the collector a like affidavit, and, if this be not done, "the certificate of registry granted to such ship or vessel shall be forfeit and void. If the affidavit made under § 4, is untrue in any matter of fact, the vessel or her value is forfeit. The oath of the owner, (§ 4,) must state facts showing that the vessel was built within the United States, or other facts showing her entitled to be registered under § 2 and (§ 8) if she was built in the United States, a certificate of the master builder must be produced to show that fact. "Previous to the registry of any ship or vessel, (§ 7) security must be given by bond to the United States, that "the certificate of such registry shall be solely used for the ship or vessel for which it is granted, and shall not be sold, lent, or otherwise disposed of to any person or persons whomsoever," that, in case the vessel shall be lost, captured, or destroyed, the certificate, "if preserved," shall be delivered up to a collector, and that, "if any foreigner, or any person for the use and benefit of such foreigner, shall purchase or otherwise become entitled to the whole or any part or share or of interest in ship or vessel, the same being within a district of the United States, the said certificate "shall within seven days after such purchase, &c., be delivered up, and, if she be in a foreign place, or at sea, when the transfer is made, then the master shall deliver up the certificate within eight days after his arrival within any district of the United States. Section nine provides "that the several matters hereinbefore required having been complied with, the collector of the port to which the vessel belongs "shall make and keep in a proper book, a record or registry thereof, and shall grant an abstract or certificate of such record or registry as nearly as may be in the form given by the act. This certificate is popularly known as the ship's register, and is the evidence, in all ports and places, of her national character, and that she is entitled to the protection of our government. If it be "lost or destroyed, or mislaid," the vessel must be registered anew in compliance with all other requirements of the act, except the surrender of the certificate, for which is substituted the oath of the master, that it is lost, destroyed, or unintentionally and by mere accident, mislaid, and (except where the allegation is that the certificate has been destroyed,) that if it be found again and within his power, it shall be delivered up. (§ 13.) If a registered vessel be sold, in whole or in part, to a citizen or citizens of the United States, or alternated in form or burthen, section 14 declares "she shall be registered anew, by her former name, according to the directions hereinbefore contained, (otherwise she shall cease to be deemed a ship or vessel of the United States,) and her former ceatificate of registry shall be delivered up," &c. The same section provides that, "in every such case of sale or transfer, there shall be some instrument of writing, in the nature of a bill of sale, which shall recite at length, the said certificate, otherwise the said ship or vessel shall be incapable of being so

registered anew." and it repeats that if not so registered anew, "she shall not be entitled to any of the privileges, or benefits of a vessel of the United States," and it inflicts a penalty of $500 on her owner or owners, if the former certificate is not delivered up, or proved by oath to have been destroyed, lost, or unintentionally mislaid. Section 16 provides that in case a registered vessel shall be sold in whole or in part "by way of trust or confidence, or otherwise to a subject or citizen of any foreign power or state, and such sale or transfer shall not be made known in manner hereinbefore directed," (that is by keeping that part of the condition of the bond mentioned in § 7, which relates to such a sale,) such ship or vessel, together with her apparel, tackle and furniture, shall be forfeited," with a saving of the interest of an innocent owner in certain cases. Upon entry in any port of the United States from any foreign port or place, at a port at which an owner resides, he must make oath that the register contains the names of all the owners, or in case there has been a transfer, he must make oath to that fact," and, if there be no owner at the port, the master must make oath, and if the owner, or master shall refuse to take the oath, the vessel ceases "to be entitled to the privileges of a ship or vessel of the United States, (§ 17.) By § 18 the master on entry of the vessel (that is whenever she comes into port,) must produce the certificates of registry to the collector of the district, and if he fails so to do "she shall not be entitled to the privileges of a vessel recorded under this act." By § 27, if any certificate shall be fraudulently, or knowingly used for any ship or vessel not then actually entitled to the benefit thereof according to the true intent of this act, such ship or vessel shall be forfeited to the United States, with her tackle, &c. This, apparently, is intended for those cases where a vessel has forfeited her privileges, under §§ 14, 16, 17, 24, &c. By § 28, the false making of any oath required by the act, is declared to be perjury.

This (excepting provisions for a few special cases,) is a summary of the Act of 1792. Vessels registered under it are entitled to engage in foreign commerce and cannot, in general, coast. On the other hand, coasting vessels cannot go foreign, until they have surrendered their papers and taken out registers, and if they do are forfeited. (§ 8.)

Under the Act of 1793, two papers are necessary to a coasting vessel of the United States, the enrollment and the license.—The enrollment is equivalent to a register, and (§ 2) can be obtained only by such a vessel as is capable of being registered. It is a record, and a certificate of it is granted to the vessel.—Registered vessels can be enrolled on surrendering their register, and complying with the act, (§ 3.) The privilege of coasting is conferred by a license, (which is recorded and a certificate given,) which runs for one year only, (§ 4,) and ceases so be in force on the least change of ownership, (§ 5.) The enrollment is, by § 2, made subject to the provisions of the act of 1792, and in similar cases the same proceedings are to be had, as under this act. Ves-

sels of less than twenty tons may be licensed without enrollment. The provisions of this act touching requisites for these papers and their returns to the collector, and the duties of owners and masters, and forfeitures and penalties, are when not identical, so analogous, as to show clearly that the same policy prevades and dictates both. Thus (§ 32) a transfer to a foreigner forfeits the vessel; and (§ 5) so does her being found with a forged or altered license, or making use of a license granted for any other ship or vessel. As to the act of 1831, "to regulate the foreign and coasting trade, on the Northern, North-eastern and North-western Frontiers," &c., it was designed to facilitate the mixed commerce of the frontiers; and (§ 3) provides that any "vessel of the United States navigating the waters on these frontiers," otherwise than by sea, shall be enrolled and licensed "in a form to be prescribed by the Secretary of the Treasury," which enrollment and license shall authorize any such vessel to be employed either in the foreign or coasting trade," and declares that no certificate of registry shall be required for vessels so employed on the said frontiers, but adds the proviso that "such vessels shall be in every other respect, liable to the rules, regulations and penalties now in force, relating to registered vessels on our Northern, North-eastern and North-western Frontiers. Those rules, &c. are to be found in the act of 1792.

From this statement of these acts, it seems very obvious that they were not designed to afford the means of ascertaining the title of vessels, or of settling controversies among our citizens as to such title. The acts of 1792 and 1793 were, I believe, substantially, but copies of the British navigation acts of their time. Both require, before a new register or enrollment can be given upon a change of owners, the production of a bill of sale from the alleged vendor, with a copy of the outstanding paper embodied in it, in which paper and its record, his name must appear as an owner, and hence it follows that if the original register was true as to ownership, and the papers on which the register of the vessel has been changed from time to time were also true, the records of the office preserve, as they were designed to, the true history of the title; but this is a mere incidental consequence of the provisions of acts whose objects and policy are national. Why should Congress, in performing its high duty of regulating navigation for the whole country, without necessity, descend to the decision of private contests touching property, or to interference with such controversies? In these old acts it kept itself scrupulously and majestically within its own sphere. From the provisions of the acts themselves to say nothing of the concurring policy of all civilized commercial nations, it is obvious that they were designed to restrict American commerce to American bottoms, and to confine the transaction of it as for as practicable to citizens of the United States. Hence the jealousy manifest as to the use of the papers conferring the national character upon vessels; the surrender of papers when expired or forfeit required

whenever practicable; and the forfeitures and penalties exacted for non surrender, forgery or misuse. Thence the forfeiture upon conveyance direct or indirect, of any interest in a vessel of the United States, to a foreign subject or citizen, if not followed by the surrender of the paper or papers. Hence, too, the required insertion of the names of all the owners in the papers, and the strict proofs of their citizenship. Upon a change of ownership in whole or in part, the bill of sale is to be produced before a new register is made, in proof of the transfer, because it is the usual mode of conveyance in all maritime countries, and because oral evidence of sale is not easily producible, and, if produced, could not embody a copy of the outstanding paper, the insertion of which in the bill of sale was perhaps deemed important, as a means of identifying the subject of sale with the vessel registered and as a preventive of frauds; but Congress did not require the bill of sale to be recorded.

The English authorities sustain these positions. By § 11 of the 21st James 1, Ch., 19, a bankrupt act, it was enacted that when any person or persons at the time of their becoming bankrupt, "by the consent and permission of the true owner and proprietary" had in their possession, order and disposition any goods or chattels whereof they shall be reputed owners and take upon them the sale, alteration or disposition as owners, in every such case the commissioners should have power to sell and dispose of them for the benefit of the creditors as fully as any other part of the estate of the bankrupt. In Robinson *vs.* Macdowell, 3 Maule and Sellw., 288, in the King's Bench, the case was this: C., of Hull, when his ship was registered, transferred her by a regular bill of sale to S., of London, and the transfer was made under the 26 Geo., 3 Ch., 60; and 34 Geo., 3 Ch., 68, (The British Navigation Act,) by surrender of the Hull register and registry of the vessel at London, but by the consent of S., C. retained the order and disposition of the ship until he became bankrupt, and the question was whether the assignees took the property under § 11 of the bankrupt act. Lord Ellenborough, in pronouncing judgment, remarked concerning the registry acts: "They were passed for purposes of public policy to confine to British subjects, and to British built ships, the benefits of British trade. They were not intended with any view to the convenience of individuals, or to give notoriety to this species of property and to the conveyances affecting it; but the notoriety, as far as there is any, is in consequence of the measures adopted to effect the policy of the statute." It is worthy of note that here Lord Ellenborough, apparently in confirmation of these views, remarked that the statutes conferred no private right of access to the records of the conveyance of ships, and that such access could be legally asserted was doubtful. Remarks which, perhaps, were borne in mind when the Act of Congress of 1850 was passed. The judgment in favor of the assignees proceeded upon the ground that the case, if it had occurred before these statutes were enacted, would have been within the provisions of the bankrupt act, that the assignees took

the property by operation of law thereunder, and that the Acts of George the Third had not changed the effect of that act. The Court said: "The registry acts make certain forms necessary to the validity of transfers and conveyances which antecedently would have been good without them, but it never was intended that a compliance with these forms should give validity to a transfer and conveyance which antecedently would have been bad and invalid; and we think such an effect ought not to have been attributed to them." Here we may observe, in passing, that the case favors the notions that these registry acts make a bill of sale in the statute form essential to the conveyance of a ship, and that before their passage, an oral sale was sufficient. Hay *vs.* Fairbavin, 2 Barn. and Ald., 193, was a similar case in the King's Bench, and was similarly decided on the authority of Robinson *vs.* Macdowell, and the judgment was affirmed in error in the Exchequer Chamber, under the title of Monkhouse *vs.* Hay, (2 Bryde and Ring, 114.) Kirkley *vs.* Hodgson, (1 B. and Cress., 588,) is a simllar case in the King's Bench, decided in the favor of the assignee; and Atkinson *vs.* Mating, 2 Term R., 462, is an earlier case where the King's Bench held that the mortgagee could maintain trover against the bankrupt's assignees, when the vessel was mortgaged while at sea, and the grand bill of sale delivered to him, and the bankruptcy occurred before the return of the ship, and immediately on her return, the mortgagee took possession of her, and the assignees thereafter took and converted her.

The act of Congress of July 29, 1850, is evidently a departure from, or rather an enlargement of the policy of the former acts. It is also evidently in addition to them, although not so entitled. Thus the fifth section brings them more closely into the similitude of the British Statutes, by requiring that the owner's oath (act of 1792, § 4,) shall set forth the part or proportion of the vessel belonging to each owner, and that the same shall be inserted in the register or enrollment, and that all bills of sale of vessels registered or enrolled, shall set forth the part of the vessel owned by each person selling, and the part conveyed to each person purchasing. In these provisions there is nothing decisive of the character of the act. But § 1 declares that "no bill of sale, mortgage by hypothecation, or conveyance of any vessel, or of any part of any vessel of the United States, shall be valid against any person other than the grantor or mortgagor, his heirs and devisees, and persons having actual notice thereof, unless such bill of sale, &c., be recorded in the office of the collector of the customs where such vessel is registered or enrolled," but saves liens by bottomry. Section two requires the collector to keep proper books for recording, and to record therein, all such bills of sale, mortgages, &c., and all "certificates for discharging and canceling any such conveyances in the order of their reception, noting in the books, and also in the bill of sale, &c., the time when the same was received, and to certify on the bill of sale, &c., the number of the book and the page where recorded; and for recording any such conveyance, or certificate of discharge, his fee is fifty cents. Sec-

tion five requires the collector to keep indexes of the record, "inserting alphabetically the names of the vendor and mortgagor, and of the vendee and mortgagee," and to permit them and the record to be inspected in office hours under reasonable regulations, and when required, to furnish to any person a certificate setting forth the names of the owners of any vessel registered or enrolled, the parts or proportions owned by each, (if inserted in the register or enrollment,) and also the material facts of any existing bill of sale, mortgages, hypothecation or other incumbrance upon such vessel, recorded in the last register or enrollment, viz.: the date, amount of such incumbrance, and from or to whom, or in whose favor made." For this certificate the collector is to receive one dollar. Section five says: that the collector shall furnish certified copies of such records on the receipt of fifty cents for each bill of sale, etc.

The act is plainly, in some sense, a recording act; but to what extent, or to what end? It is very plain, too, that it was drawn by some person not familiar with law, though, perhaps, familiar with the particular statutes which he desired to enlarge. No lawyer would have written "grantor of a vessel," or that a vessel could be held by inheritance or devise; nor would a skillful lawyer have used "hypothecation" and "conveyance," as distinguished from "bill of sale" and "mortgage" of a vessel, nor have talked of a "certificate for discharging and cancelling a conveyance." Such errors are, in these days, too common in legislative acts; but in this case they do not cloud the main intention and effect of the statute. As a recording act, in the full sense of the term, it would be ridiculous to view it. No proof of the due execution of any bill of sale, mortgage, or discharge of a mortgage, is made pre-requisite to the recording of it, nor is the record or a certified copy of it made evidence of any fact whatever, though the former, and perhaps the latter, would be evidence, probably, of the fact of record simply: a fact which, as to a bill of sale or mortgage in any view of the purpose and effect of § 1, would be of high importance. Thus, on a contested claim for a new register, A appearing as sole owner in the outstanding one, C produces a bill of sale from B to himself, and an unrecorded prior bill of sale from A to B, but C, his opponent, exhibits a bill of sale from A, subsequent in date to A's conveyance to B, but is able to show it recorded, and so triumphs, unless actual notice of the prior bill of sale is brought home to him. So, if the contest is at law touching the title, and § 1 is to be operative there, the fact of the recording of a conveyance or mortgage may be decisive of the issue. It must be observed that the duty of the collector to record all such conveyances, &c., seems to be imperative. The truth, perhaps, is that, in view of the floating character of the property, Congress hastily imagined that, by allowing anybody to have whatever he claimed to be a bill of sale, or mortgage, or certificate of discharge of a mortgage of a vessel to be so recorded, and requiring the records to be so indexed and kept accessible, and copies and certificates or abstracts of these claims of title and

incumbrance be furnished, on request, for reasonable fees, the convenience, and perhaps the safety, of persons interested, directly or indirectly, in vessels, would be promoted. At any rate this is the utmost effect that can be given to the record and subsequent sections.

But there may be more serious questions as the express provision of section one, that no unrecorded bill of sale, &c., shall be valid against any person other than the grantor (vendor,) his heirs (executors or administrator), and devisees (legatees,) and persons having actual notice thereof. It may be satisfied by restraining the litigation in which such a bill of sale or mortgage shall be deemed invalid, to conflicting claims for paper in the collector's office. Such a construction would hardly be in case of the collector, for it would throw upon him the burthen of taking proofs as to actual notice of an unrecorded instrument. Before the act, the collector, in general, had nothing to do with such contests, but gave papers to the first comer who complied with the requirements of the act. The litigation, as to title to the vessel, was confined to the courts. But this construction, as the collector would generally be able to decide the right to papers by a mere inspection of his records, would, almost equally with the old practice, be beneficial to navigation by keeping the vessel a vessel of the United States, while otherwise, her papers having expired by change of ownership, she would be bereft of that character and useless for purposes of commerce. Still there are many cases in which his records would not show a chain of title from the last owner, and where there is no authority reposed in him to hear or to determine. For instance, a bill of sale from the last owner, not containing a copy of the last register and such owner dead or refusing to perfect the bill; or a bill of sale regular in form, but lost or destroyed; or two such bills to different persons, presented at the same time for record. Indeed, I am compelled, reluctantly to reject this construction. The language of this section is such, especially when considered in connection with the subsequent provisions of the act, as to indicate clearly the intention that it should operate as a statute of frauds, and absolutely, and in all courts, avoid unrecorded conveyances and mortgages of vessels of the United States. Without venturing to consider whether it is competent for Congress to bind its courts by such an act as this, we must inquire whether it has such a power over the courts of the sovereign States.

The power to regulate navigation is but parcel of the power to regulate commerce. The power to regulate the vehicles of commerce cannot extend to regulating them when not employed in commerce. It is their being in commerce which makes them part of the commerce meant by the constitutional grant of the power. Hence, neither of the former navigation acts, nor the act in question, assume to regulate any ships or vessels, though built in and wholly owned by citizens of the United States, except such as are by registry or enrollment made "vessels of the United States," and so vested with the privileges of engaging in the commerce which Congress has power to regulate.

The British Parliament is, it is said, omnipotent, and at any rate is untrammelled by a written constitution. Its acts of registration (to which I have no access) may have the effect, which, it seems, Lord Ellenborough attributed to them in Robinson *vs.* Macdowal (*supra*) and which Lord Stowell, in the case of the Sisters (5 Rob., 155) ascribed to them. It may well be that if Parliament prescribes a form and authentication of a conveyance of a ship, and say that an oral conveyance, or one of a different form or authentication, shall be void, the British Courts would hold the informal conveyance void, irrespective of the title or objects of the act. But Congress is limited in its powers of legislation, and, if our wisest statesmen have not erred, there is much danger to the country should it exceed those limits, and be unchecked. I can find no warrant in the constitution for its legislating directly over ships and vessels as property, irrespective of their uses as vehicles of the commerce of the United States.

A vessel capable of registration, whether registered or not, is private property. From the instant her keel is laid, to the instant of her dissolution, she is private property. Congress cannot compel her owners to employ her in trade. They voluntarily comply with the requirements of the navigation acts, and so make her subject to the acts of Congress regulating commerce, and they can, at any moment, by surrendering her papers, divest her of nationality, and withdraw her from subjection to those acts. Though it is almost as clear as day, I must here point out that the acts of 1792 and 1793, recognize, beyond all question, the existence of American built ships, owned wholly by citizens of the United States, and yet not vessels of the United States, incapable of participating in its commerce, and subject only to its penal, and not to its regulating laws. Thus section 3 of the act of 1792, contemplates, as a subject of registry an American built ship owned wholly by citizens and as yet unregistered; section 13 seems to imply that a loss, mislaying, or destruction of the register, denationalizes her; section 14 declares that if there be any the least change of ownership, and she be not registered anew, she shall not be deemed a vessel of the United States, nor entitled to the privileges or benefits of such a vessel; the same section provides that, unless the bill of sale contains a copy of the register, she shall be incapable of being so enrolled anew, but does not forfeit her in such a case, nor declare that she shall cease to be property; section 16 recognizes the validity of a transfer of a registered vessel of the United States to a subject or citizen of a foreign state or prince, provided the certificate of registry be duly surrendered to the proper collector, and the act of 1793 contains similar provisions; and chapter 20 of the acts of 1797 provides, that where a vessel has been sold or transferred by process of law, and it appears to the Secretary of the Treasury, by satisfactory proof, that the register, or enrollment and license, is retained by the former owners, he may direct the granting of a new register or "on the owners' under the sale," complying with all the requirements of law, except the delivery up of the former

certificate of registry, &c. It is this right of property, existent whether the vessel be on the stocks, full freighted and afloat, as a vessel of the United States, or lying idly in port after a loss of nationality, or while the right of property in her is a litigation in a State Court, or a wreck upon the strand—it is the property as distinguished from evidences of it to be required on registration, the regulation of which is not pertinent to commerce, and it is not within the legislative power of Congress. If it can, in this respect, regulate the vehicle, why cannot it regulate the subjects of commerce, and declare that no sale of a bale of cotton or a bag of wheat, shall be valid, unless it is evidenced by a bill of sale produced to the collector?

I refer reluctantly to the once vexed question, whether a ship can be orally transferred. The controversy arose long after the acts of 1792 and 1793 were in operation. It is sufficient to say, in this State, it was held that from the beginning, that an oral conveyance, with delivery, was good at common law, and that these statutes affected the right of registration and nothing more, and that the register was, of itself, no evidence whatever of ownership, though, in connection with acts of the party in procuring it, it might be of his ownership (Wendover *vs.* Hogeboom, 7 Johns. 308. Sharp. *vs.* The United States Insurance Company, 14 Johns, 201. Leonard *vs.* Huntington, 298, 302. Flanders *vs.* Hewitt, 3 Barb., 201. Ring *vs.* Franklin, 2 Hall, 1.) Such also have been the rulings of the courts of Massachusetts, and of other sister states. If a transfer without a bill of sale containing a copy of the register is void, as a transit of the property, how can it work a forfeiture or penalty which is not denounced for the invalid attempt, but is consequential to the transfer? In the case of the United States *vs.* Willings, 4 Cranch, 56, an American registered vessel, while at sea, was in part sold by parol, to a citizen of the United States, and on her return to port, and before entry, he resold the part he had purchased to her former owner. The claim on the part of the United States was, that the parol sale divested the vessel of her privileges as a vessel of the United States, and thus far, that her cargo was subject to duties as though she was a foreign bottom; and the parties and the Supreme Court of the United States all assumed, with out question, that the oral transfer was a valid sale, within § 14 of of the act of 1792, requiring the ship to be registered anew. Indeed that section itself most plainly recognizes a transfer by a bill of sale containing a copy of the register, which does, and other effectual transfers without such bill which do not make the vessel capable of being registered anew.

As essential, or as incidental to the due exercise of the power to regulate commerce, Congress may regulate the management of vessels of the United States, and provide for the security of the vessels, cargoes, passengers and crews. Such are the acts establishing light houses, the acts touching pilots, the act of 1819, regulating passenger ships and vessels, the act of 1838, "for the better security of the lives of passengers on board vessels propelled in whole or in part by steam, and the acts for the relief of

sick and destitute seamen. Upon this general power to regulate commerce and the power to lay and collect duties and imposts, all its regulations of ships and seamen are founded, but upon what plea of necessity or even of expediency: How Congress can arrogate a right to abrogate the common law, or of the laws of the particular states, touching the conveyance of a single species of chattel property, and to regulate it itself, and to enact concerning it, a statute of frauds, I have been unable to imagine. Were we to abandon the high and true ground of right, and descend to the question of expediency, we would find, I am persuaded, little reason to wish such a power intrusted to Congress, and none to admire this act of 1850. It is sufficient to express our opinion, that it is not in the power of Congress to declare an otherwise legal sale or mortgage of a vessel of the United States, invalid unless recorded in the office of the collector where she is registered or enrolled, and so prevent its operating as a sufficient conveyance or mortgage. It is within its power to require the collector to record all bills of sale, and all mortgages where the mortgagees have possession under them, upon the production of which, and the surrender of the outstanding papers, new registrations of ships are made in his office; but it has no authority to require mortages, or trusts, unaccompanied by possession, and certificates of the discharge of mortgages, to be recorded. It is no part of the legitimate business of the United States of America, to keep offices for the recording of liens on vessels, and furnishing histories of the property and its incumbrances to private persons.

There is at least strong semblance of sound sense in some remarks of Lord Ellenborough, in the case of Robinson *vs.* Macdowell, (supra.) After stating that the records of the custom house were not subject to private inspection, as of right, he said: "But supposing the right of general inspection to exist, it will by no means follow that persons are bound to have recourse to it. Shall a man who supplies a ship in the port of London, upon the orders and credit of one who appears and acts in that place as owner, be told by them who suffered him to appear and act, that if he had sent to Hull, he might have learned that this appearance was delusive, and that, in point of law, the property was vested in them?"

The defendant's mortgage in this case, being unaccompanied with possession, did not work for the purposes of navigation, any change of ownership. The requirement of Congress, that it should be recorded in the collector's office in the port of Chicago, where the vessel was enrolled, was itself illegal, and therefore the record was not notice. But, if the requirement was legal, it was, in the eye of the law, made only for the guidance and information of the government in changing and granting enrollments and licenses to the vessel; and, though a right of general inspection of the records of the office is given by the act, the right is a mere gift which no one is bound to accept and therefore the record is not notice.

JOHN GANSON,
For Defendant in Error.